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# In the Supreme Court of the United States.

OCTOBER TERM, 1897.

THE UNITED STATES, APPELLANT,
*v.*
THE JOINT TRAFFIC ASSOCIATION, appellees.
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I.

It is claimed that because nothing has been done under the agreement, no irreparable injury has been or can be shown, and therefore no injunction lies. But the anti-trust law makes the agreement illegal and vests the court with jurisdiction to prevent violations of the act. The carrying out of an illegal contract will result in irreparable injury to the public, and this sufficiently appears from the provision of the law declaring the illegality and authorizing injunction proceedings.

## II.

Mr. Carter said he would not reargue the questions considered in the Trans-Missouri Case, and then proceeded to discuss what constitutes an agreement among railroads in restraint of trade, insisting that one which only prevents competition for the purpose of maintaining *reasonable* rates is not one in restraint of trade.

In the Trans-Missouri Case this court held that such an agreement *is* in restraint of trade, regardless of its purpose and the actual result of its operation. So, after all, the argument of Mr. Carter was directed to a discussion anew of the questions argued and considered and settled by this court in the Trans-Missouri Case.

## III.

It is insisted that an agreement in restraint of trade must restrain trade—that is, reduce or diminish it; that *trade* must be injured.

An agreement in restraint of trade may or may not diminish or reduce trade. The injury sought to be averted by prohibiting such agreements is the injury to the public. The stifling of competition, the creation of a monopoly, may increase the trade in the product controlled, but nevertheless to the injury of the public. To stifle competition is to create a monopoly and place the public at the mercy of the monopoly. The benefits resulting from cheaper products through monopolies have never been held by courts or legislatures as sufficient to overbalance the evils to the Government and people from the creation of monopolies. It is a question of method

rather than result. Trusts and monopolies are forbidden in order to preserve competition, and thereby, as far as possible, freedom of action in industrial and commercial life.

## IV.

It is said that competition is not trade, but a mere incident of trade; that what prevents competition does not necessarily injure trade; on the contrary, to restrict competition may benefit trade; that the whole world is now groaning under competition; that the hard rule of the survival of the fittest bears heavily upon the mass of the people; that there is a spirit of unrest, of dissatisfaction, and that to avoid the effects of ruinous competition among employers and employees combination is the rule.

It may be conceded that the law of the survival of the fittest is a hard one; that the necessity of competition under existing conditions presses heavily upon the weak. But, after all, competition is not only the life of trade, but the underlying basis of our social and industrial life. There may be a better way, but we have not yet found it. Competition goes along with freedom, with independent action. This country was founded on the principles of liberty and equality. It sought to secure to every citizen an equal chance under the law. That is all the people have demanded or do demand—a fair show in the race of life. Undoubtedly there is unrest, dissatisfaction, tendencies to anarchy and socialism, but these result not from competition, but the throttling of competition by trusts and combinations, which seek to control production and transportation and dominate both

workingmen and consumers. Against these the individual citizen protests. He does not demand *no* competition, but *fair* competition. Combinations of workingmen accompany aggregations of capital. Thus the masses are arrayed against the classes. If combinations of capital were prevented, if competition among employers of labor were enforced, the independent demand for labor from competing sources would tend to fair wages, such as prices might warrant.

## V.

It is insisted that this agreement among railroads to prevent competition is not only innocent, but wise and salutary, because in the case of railroads competition is ruinous; that if competition reduces rates below the point of profit for any line, it must ultimately be bankrupted, for it can not stop running nor can the capital invested in it be withdrawn.

But this argument applies to all great modern industries, in manufacture as well as transportation. Capital fixed in a valuable plant can not be withdrawn, nor can labor skilled in one industry be readily shifted to another. Both manufacturers and workingmen are subject to the contingencies of competition. The establishment of a new plant with modern improvements may destroy some old one, in which both have virtually risked their all. There are sections where a number of years ago it was profitable to make iron out of local ores. Millions of dollars were invested in furnaces. Workingmen skilled in iron-making settled there, and with their earnings bought property and built homes. Subsequently, in

other sections more accessible to the markets, with cheaper ores, modern furnaces were erected and cheaper iron began to be made. The old furnaces could not meet the competition of the new. They had to be abandoned. Was it possible to withdraw the capital invested in them? Not at all. It was lost. The workingmen, too, suffered. They were thrown out of work, ran up debts, lost their homes.

Why are not men who put their capital or skill into a manufacturing plant just as much entitled to protection against ruinous competition as those who put their money or skill in a transportation plant? Why should the railroads be singled out from all the great interests of this country, and alone be authorized to combine and prevent competition and keep up prices?

Competition drives the weak to the wall, the fittest survive, but the greatest good to the greatest number results. The opening of new mines, the construction of new plants, the establishment of industries with improved methods of production and greater natural advantages, lower the cost of production of the commodity to the benefit of the public, but the person or corporation or region which can not lower its cost of production to meet the new competition must suffer. Under competition the most improved plant, the best trained labor, the most economical management, the wisest business sagacity and foresight, is not only encouraged but demanded for success.

The best railroad, the one constructed and equipped and managed in the best way, will get the bulk of the competitive business, and it ought to. It can afford to

carry the traffic at lower rates than the poorer roads, and it ought to be allowed to, in the public interest. The poorer roads can get the business by putting themselves in shape to do the business. Roads equally fitted to do the work will naturally divide the competitive business in equitable proportions. Competition for traffic by improved service and lower rates will result, naturally, not in ruining the roads, but in building them up. Under competition, the best road fixes the rate; under combination, the poorest road. Is it just to make the public pay rates from Chicago to the East fixed by the poorest system protected by the Joint Traffic Agreement?

## VI.

It is contended there is no restraint on trade, because the railways still exist with all their facilities for transportation, ready and willing to serve the public, and with no inducement for service weakened; that competition in every desirable aspect remains, the railroads being permitted to compete, but compelled to do it openly, under the provision that a deviation from the association rate can not be made except by resolution of the board of a member and after thirty days' notice to the Managers.

It is true the railways exist with their original facilities, but the inducement for improvement by cheaper methods of transportation is weakened, the motive for competition removed, the means of competition destroyed, and competition itself absolutely forbidden. The natural result of preventing competition is to keep up rates. An excess in rates over what would obtain under competition amounts in effect to a tax on the

things transported. This operates as a burden upon commerce, and a restraint of trade.

If a State should levy a tax on goods transported through it, this court would hold such an act unconstitutional, because it laid a burden upon interstate commerce. Moreover, to increase rates and maintain them at a point above what would obtain under competition decreases the business of railroads but enhances the cost of it, and thus restrains trade or commerce. Lower rates mean more traffic, both freight and passenger. Higher rates mean less traffic. It may be to the interest of the railroads to increase the rates and lessen the traffic. The profits may be as much or more, but it is done at the expense of the public and to the restraint of trade.

## VII.

It is insisted that rates must be stable, not subject to change; that a manufacturer can not safely make goods nor a dealer buy them unless he knows the rates for transporting them to market, and may rely upon these rates continuing; therefore agreements for maintaining rates at a fixed point should be encouraged.

It is obvious that the manufacturer or dealer must not only take into account the rates he will have to pay to market, but the rates his competitors from every quarter, by land and water, will have to pay. It is impracticable to attain a cast-iron uniformity of this kind, and neither the interstate commerce law nor the Joint Traffic agreement attempts it. Moreover, the agreement does not assume to prevent a change of rates. It virtually takes the power to change from the companies, but gives it to

The Managers of the Association. For natural it substitutes arbitrary change. The protest against any change in rates is a protest against progress. The history of railroads shows a constant tendency toward cheaper rates. This has resulted from improvements forced by competition. The interest of the public lies not in maintaining but in reducing rates, and to effect such reduction competition is essential.

## VIII.

Uniformity in rates is declared to be essential, and it is urged that the provisions of the interstate commerce law favoring uniformity can not be enforced except by suppressing competition through this agreement; and, to illustrate the need of uniformity, it is said that without it an industry in Michigan equidistant from market with a similar industry in Indiana might be wiped out of existence by reduced rates in favor of the Indiana industry.

But neither the interstate commerce act nor this agreement would prevent the alleged injustice suggested. The case instanced involves a reduction in rates on local traffic, and the agreement only applies to competitive traffic. There is nothing in the agreement to prevent any member of the association from changing the rates from local points; the jurisdiction of the association is restricted to competitive traffic.

Suppose two similar industries located in Pennsylvania, each supplying the New York market, and each equally distant from New York, but one located on the Pennsylvania and the other on the Lehigh Valley sys-

tem. For one industry the Lehigh Valley is the only line to New York; for the other the Pennsylvania. There is nothing in the interstate commerce act, or in the Joint Traffic Agreement, to prevent the Pennsylvania from reducing the rate to New York; nothing to prevent the Lehigh Valley from reducing such rate.

The uniformity demanded by the interstate commerce act is uniformity in the treatment by *each* railroad of *its own* patrons. The second section prohibits a common carrier from charging one person more than another for the same service; it does not prohibit a carrier from charging one person more or less than another railroad charges another person for an equal distance. The third section forbids a common carrier to give any undue preference or advantage to any person or locality over any other. But this only applies to the action of a railroad toward the people or the places served by *it*. And so, too, with reference to the long and short haul provisions in the fourth section.

The interstate commerce law declares that all charges must be reasonable and just. It provides no means for securing this desideratum except competition. The only method of stifling competition when the law was passed was the pooling agreement, and this was forbidden. Competition between railroads was preserved, and to secure the benefits of competition to all patrons of each road it was provided that the competition should be open and above board, so the people might be advised of the existing rates, and each railroad was required to treat its patrons with uniformity, without discrimination and without preferences.

The object of the law was to secure the benefits of competition to *all*, and not permit a road to charge those shippers for whose patronage it does not have to compete excessive rates, while secretly granting lower rates to those shippers for whose patronage it has to compete. The competition was to be restricted to where it belongs; between the railroads and not between the shippers. If a railroad can afford to carry the freight of one shipper for a certain rate, it can afford to carry for the same rate like freight under similar conditions for every other shipper.

In *Chicago & N. W. Ry. Co.* v. *Osborne* (52 Fed. Rep., 912) the circuit court of appeals for the eighth circuit, speaking by M . Justice Brewer, in construing the act to regulate commerce, said (p. 914):

> Congress has not attempted to require that tariffs on all roads be uniform, nor has it attempted to place a limit in figures beyond which no company may go in its charges. The laws of business and of competition have as yet been deemed sufficient restraints in that direction. The Rock Island is, between Chicago and Missouri River, a parallel and competing road with the defendant company; yet there is nothing in the commerce act which compels either company to charge for through or local transportation the same as its competitor. Either company may reduce its rates as far as it pleases below what is reasonable and a fair compensation for the service without violating the act; and such reduction compels no change by its competitor or any other company. This is obvious from a mere reading of the act.

## IX.

It is contended that uniform rates should be maintained on the trunk lines in order to keep the weaker roads in operation for the benefit of the sections through which they run.

As I have pointed out, the agreement does not apply to local traffic. As to it, each road has a monopoly, with power to fix its own rates. The agreement applies only to competitive traffic between great centers. The argument, then, amounts to this, that the rates on through traffic are to be kept up in order to preserve the weak roads as going concerns for the benefit of the sections through which they run. What is this but to tax the many for the benefit of the few? It is not the function of Government to neutralize the advantages of locality. The people pay for these and are entitled to them. If I settle in a flourishing region on a good line, I pay for the privilege in the cost of the land, in taxes, etc. If I settle in an undeveloped region on a poor road, I pay little for either the privilege or the land, and must expect to help bear the cost of development.

## X.

It is said that the interstate commerce act was passed to suppress competition and secure uniformity in rates.

It was not passed to suppress competition, but to preserve it and secure its benefits to all. Competition between independent lines was preserved and uniformity enforced to secure the benefit of this competition to all. Each carrier was required to treat its patrons with uniform

fairness, without preference and without discrimination. The only effective arrangement used at that time by the trunk lines to stifle competition was the pooling agreement, and this was prohibited. It was recognized that competition would keep the rates reasonable, and the long and short haul provision was intended to secure to all points on each road the benefit of such competition. Unjust discrimination and undue preferences by a railroad among its patrons were prohibited. Thus the benefits of open competition were insured to all. The policy was—among the patrons of each road uniformity, but between the roads open competition.

In this connection let me direct the court to what Judge Cooley says in the first Report of the Interstate Commission, 1887, p. 33:

> The tendency to consolidation excited public distrust, being looked upon as *a device to avoid competition* and to deprive the public of the benefits of having more than one line of transportation for the same traffic, which, in some cases, had been the chief inducement to the building of particular lines. Laws were therefore passed forbidding consolidation.
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> * * * * *
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> The pooling system was looked upon with distrust by the public, mainly because *it seemed to be a scheme whereby competition between the roads could be obviated*, and rates for railroad service put up or kept up to unreasonable figures. But if railroad managers supposed that by this scheme they were to stop competition among themselves, the result has not answered their expectations. The competition has still gone on, each road striving to obtain as large a share of the business as possible, and no agreement

among them could altogether prevent a yielding to the pressure of shippers for lower rates.

* * * * *

The act to regulate commerce, expressing in that particular the desire of Congress to preserve to the people the benefits of competition, contains the following provision (citing the antipooling section):

## XI.

The point is made that railways are public highways, and the furnishing of railway transportation a governmental function; therefore the Government should eliminate the advantage of locality by enforcing absolute uniformity in rates, or permit the railroads to do it by preventing competition and maintaining arbitrary rates.

It may be conceded that the furnishing of railroad transportation is a public function, and therefore the Government may regulate it. Government, State and Federal, has done this, by forbidding the consolidation of competing lines, by prohibiting pooling contracts, and by making illegal all agreements in restraint of trade.

The absolute uniformity demanded is neither practicable nor desirable. Absolute uniformity, extending to every rate, from every point, on every railroad, means absolute consolidation of control and absolutely arbitrary rates, and this is absolutely inconsistent with competition. It admits of no competition. The desirable uniformity is that which goes along with competition, and supplements it, and secures its benefits to all shippers, without distinction. Each railroad should be required to treat its patrons—persons and places—with fairness and

equality, without preference or discrimination. It should not be required, however, to treat its shippers no better than other lines treat theirs. On the contrary, it should be induced to treat its shippers the very best it can, and thereby make it incumbent upon competing lines to treat their shippers as well. It should be induced to do this not only in rates but in service. The rigid, cast-iron, arbitrary rule of absolute uniformity as between railroads, contended for by Mr. Carter, would logically prevent all competition, whether in rates or service.

In *Ames* v. *Union Pacific R. Co.* (64 Fed. Rep., 165) Mr. Justice Brewer said (p. 175): "In the matter of transportation we are in an experimental or transitional stage," and characterized transportation as being still a *business* as distinguished from a system under Government control or restricted by Congress under laws fixing maximum charges. In another part of the opinion it is remarked (p. 172) that "railroad companies can not plead their own convenience or the effects of competition between themselves and other companies in restraint of the otherwise undeniable power of the State."

In *Int. Com. Com.* v. *B. & O. R. R. Co.* (145 U. S., 276) Mr. Justice Brewer, speaking for the court, said that the act to regulate commerce was not designed "to prevent competition between different roads." And in the same proceeding it was held in the circuit court by Judge Jackson, afterwards on the Supreme bench, that the act leaves the carriers free to fix their rates and secure business, as they were at common law subject only to leading prohibitions against unreasonable charges, unjust discriminations, and undue preferences. This ruling was

approved by this court, speaking by Mr. Justice Shiras, in *C., N. O. & T. P. R. Co.* v. *Int. Com. Com.* (162 U. S., 184), and by Mr. Justice Brewer in the Freight Bureau cases (167 U. S., 479).

In *Southern Pacific Co.* v. *Board of Railroad Commissioners of California* (78 Fed. Rep., 236) Mr. Justice McKenna, then circuit judge, said with reference to economic laws governing transportation (p. 256): "It is certain that they are not the same for a road which has no competitors as for a road which has competitors, not the same for *monopoly* as for *competition*."

## XII.

If the railroads are not to be permitted to combine and prevent ruinous competition, and establish and maintain reasonable rates by arbitrary methods, then, it is said, they must either abandon transportation, or consolidate, or persistently violate the law.

There is a virtual consolidation of these roads now under the agreement. The public is not interested in consolidation except as it affects competition. The constitution and laws of many States prohibit the consolidation of railroads, but only of *competing* railroads. Lines which do not compete may consolidate, and the public thus gains the benefit of broader and more economical administration. Railroads which compete may not consolidate, because it prevents competition and keeps up rates.

Public policy has demanded the prohibition of the consolidation of competing lines; for the same reason Congress enacted the antipooling section of the interstate

commerce act. The pooling of freights and the division of earnings is not bad in itself. It is bad, because used to stifle competition. Equally bad is the Joint Traffic Agreement before the court, which operates as effectively as any pooling arrangement ever devised. The people have not stopped to inquire whether consolidation would result of necessity in unreasonable rates; neither have they stopped to enquire whether pooling would result necessarily in unreasonable rates. It is the tendency, not the absolute result, which has operated to prohibit consolidation, to prohibit pooling, to prohibit contracts in restraint of trade. Let me direct the court to its language, expressed through Mr. Justice BROWN, in *Pearsall* v. *Great Northern Rwy.* (161 U. S., 646, 676):

> Whether the consolidation of competing lines will necessarily result in an increase of rates, or whether such consolidation has generally resulted in a detriment to the public, is beside the question. Whether it has that effect or not, it certainly puts it in the power of the consolidated corporation to give it that effect—in short, puts the public at the mercy of the corporation. There is and has been, for the past three hundred years, both in England and in this country, a popular prejudice against monopolies in general, which has found expression in innumerable acts of legislation. We can not say that such prejudice is not well founded. It is a matter upon which the legislature is entitled to pass judgment. At least, there is sufficient doubt of the propriety of such monopolies to authorize the legislature, which may be presumed to represent the views of the public, to say that it will not tolerate them unless the power to establish them be conferred by clear and explicit language.

> While, in particular cases, two railways by consolidating their interests under a single management, may have been able to so far reduce the expenses of administration as to give their customers the benefit of a lower tariff, the logical effect of all monopolies is an increase of price of the thing produced, whether it be merchandise or transportation. Owing to the greater speed and cheapness of the service performed by them, railways become necessarily monopolists of all traffic along their lines; but the general sentiment of the public declares that such monopolies must be limited to the necessities of the case, and rebels against the attempt of one road to control all traffic between terminal points also connected by a competing line. There are, moreover, thought to be other dangers to the moral sense of the community incident to such great aggregations of wealth, which, though indirect, are even more insidious in their influence, and such as have awakened feelings of hostility which have not failed to find expression in legislative acts.

Also the language of the court by the same justice in the succeeding case of *Louisville and Nashville R. R.* v. *Kentucky* (161 U. S., 677, 698):

> This restriction upon the unlimited power to consolidate with other roads is not, as the plaintiff in error suggests, called for by any new view of commercial policy, but in virtue of a settled policy which has obtained in Kentucky since 1858, in Minnesota since 1874, in Ohio since 1851, in New Hampshire since 1867, and by more recent enactments in some dozen other States—a policy which has not only found a place in the statute law of such States as apprehended evil effects from such consolidations, but has been declared by the courts

to be necessary to protect the public from the establishment of monopolies. Indeed, the unanimity with which the States have legislated against the consolidation of competing lines shows that it is not the result of a local prejudice, but of a general sentiment that such monopolies are reprehensible.

The railroads say that if they are not permitted to prevent competition they will compete and in doing so violate the interstate commerce law; that they should be permitted to combine for the purpose of preventing violations of law, even if in doing so competition be prevented.

But to prevent competition is in itself to violate the law. Better the chance to violate one law than the certainty of violating another. Better the motive to violate one law than the mandate to violate another. If the ability the railroads employ to circumvent the law were used to observe it, neither this agreement nor the arguments in support of it would be before the court. The railroads promise to obey one law if the court will permit them to violate another. Would they keep the compact, if made? Respect for law based solely on self-interest is delusive and evanescent.

## XIII.

An attempt is made to distinguish this case from the Trans-Missouri Case by saying that here The Association simply adopted the admitted fair and reasonable rates then in force and filed with the Interstate Commerce Commission by the companies; while in the Trans-Missouri Case The Association was given power to fix rates.

But in the Trans-Missouri agreement The Association was only given power to fix reasonable rates, and the fact that the rates fixed by The Association during its existence were fair and reasonable was admitted, the denials and allegations of the answer which appear in the statement of the case (166 U. S., 303) being as follows:

> They denied the allegation that they were not content with the rates and prices prevailing at the date of the agreement; they denied any intent to unjustly increase rates, and denied that the agreement destroyed, prevented, or illegally limited or influenced competition; they denied that arbitrary rates were fixed or charged, or that rates had been increased, or that the effect of free competition had been counteracted; they denied any purpose in the formation of the association to monopolize trade, traffic, and commerce between the States and Territories within the region mentioned in the bill; and they denied that the agreement was in any respect the illegal result of any unlawful confederation or conspiracy. The defendants alleged that the proper object of the association was to establish reasonable rates, rules, and regulations on all freight traffic, and the maintenance of such rates until changed in the manner provided by law; that the agreement was filed with the Interstate Commerce Commission, as required by section 6 of the act of February 4, 1887.
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> They also alleged that it was not the purpose of The Association to prevent the members from reducing rates or changing the rules and regulations fixed by The Association; that by the terms of the agreement each member might do so, the preliminary requirement being that the proposed change should be voted upon at a meeting of The Association, after which, if the proposal was not agreed to, the line

making the proposal could make such reduced rate, notwithstanding the objection of the other lines; that the purpose of this provision was to afford opportunity for the consideration of the reasonableness of any proposed rate, rule, or regulation by all lines interested and an interchange of views on the effect of such reduction, and that reductions of rates had been made in numerous instances through said process by The Association.

They admitted that the agreement took effect April 1, 1889, and that it had remained in operation since, and that the rates, rules, and regulations fixed and established from time to time under said agreement had been put into effect and maintained in conformity to law; and it was denied that by reason of the agreement, or under duress of fines and penalties, or otherwise, the defendants had refused to establish and maintain just and reasonable rates; and it was alleged that the object of The Association at all time had been and was to establish all rates, rules, and regulations upon a just and reasonable basis, and to avoid unjust discrimination and undue preference. They denied that shippers or the public were in any way oppressed or injured by reason of the rates fixed by The Association, but, on the contrary, they alleged that the agreement and The Association established under it had been beneficial to the patrons of the railway lines composing The Association and the public at large. These, in substance, were the allegations in the various answers.

There is no less power in the Joint Traffic Association than in the Trans-Missouri, indeed, more power with respect to rates, and it is with the power alone that the court is concerned, not how the power has been or may be exercised.

In the Trans-Missouri Case, The Association had been dissolved. The only question was the legal effect of the authority conferred by the agreement. If there were no power under the Joint Traffic Agreement to change rates, nevertheless the power to maintain rates arbitrarily would involve authority to keep them up after progress and invention should render them excessive and unreasonable. But in point of fact, as pointed out, the Joint Traffic Agreement vests in The Association, through The Managers, with appeal to the board of control, the authority to change rates. (Art. 5, sec. 5, Rec., p. 26; art. 7, sec. 2, Rec., p. 28.) This authority is more coercive than that conferred by the Trans-Missouri agreement.

Under the Trans-Missouri agreement five days' written notice prior to each monthly meeting was required to be given the chairman of any proposed reduction in rates. At each monthly meeting The Association voted on all changes proposed. All parties were bound by the decision of The Association "unless then and there the parties shall give The Association definite written notice that in ten days thereafter they shall make such modification, notwithstanding the vote of The Association. * * * Should any member insist upon a reduction of rates against the views of the majority, and if in the judgment of said majority the rates so made affect seriously the rates upon through traffic, then The Association may, by a majority vote upon such other traffic, put into effect corresponding rates to take effect upon the same day." Moreover, each member of the Trans-Missouri Association might, at its peril, make a rate without previous notice to meet the competition of outside lines, giving

the chairman notice of its action, so the good faith of the transaction might be passed upon by The Association at its next meeting. (Art. 2, secs. 4, 5, 6. Brief, pp. 36, 37.)

Thus, under the Trans-Missouri agreement each member might, at its peril, make a rate to meet outside competition, and each member might, upon giving ten days' notice, make an independent rate, notwithstanding the action of The Association. But under the Joint-Traffic agreement no company can deviate from the rates as fixed by The Managers, except by a resolution of its board of directors, and thirty days after a copy of such resolution is filed with The Managers. This absolutely prevents competition, and the intention to prevent competition is plain from the provision (art. 7, sec. 2, close):

> The Managers, upon receipt of such notice, shall act promptly upon the same for the protection of the parties hereto.

Mr. Carter, in his argument, explained the operation of this clause. Thirty days' notice of the intention of any company, by resolution of its board, to deviate from the rates fixed by The Association, through its Managers, was required in order that The Association might have time to determine its course of action. If it could meet the rate proposed by the deviating member, it would do so. If it could not, it would take steps, in Mr. Carter's language, "to exterminate" the recalcitrant company. In no other way, according to Mr. Carter, could ruinous competition be prevented and the interests of all members of The Association protected.

## XIV.

It may be conceded that the public along each line is interested in the line getting its fair share of the through traffic and earnings; and this it will get under competition. The local public is not entitled, however, to an arbitrary share of the through traffic and earnings. It has a right to no more than the advantages of the line attract. To give it more is to take what belongs to another line and another section. A prosperous section, with an intelligent, progressive population, makes a good railroad, and a good railroad attracts through traffic; and it is not just or right to take this traffic away and give it to a poor road in order to do for it what the public along its line ought to do.

## XV.

The provisions of the interstate commerce law preventing discrimination and undue preferences have been discussed; they can be enforced without suppressing competition. The tenth article of the Joint Traffic Agreement (Brief, p. 42) provides that "The Managers shall decide and enforce the course which shall be pursued with connecting companies not parties to this agreement which fail or decline to observe the rates, fares, and rules *established under this agreement*," and it is contended that this provision is necessary to prevent discrimination against one company and in favor of another by connecting lines; but a reading of the third section of the interstate commerce act shows that the mischief suggested is fully provided for in its concluding paragraph, which

provides that every common carrier shall afford equal facilities for the interchange of traffic and for receiving and forwarding freight or passengers from connecting lines, "and shall not discriminate in their rates and charges between such connecting lines."

## XVI.

It is insisted that if Congress had intended the antitrust law to prohibit every contract in restraint of trade, whether partial or general, reasonable or unreasonable, it would have used the language "every contract in *any* restraint of trade," etc., "is hereby declared to be illegal."

It seems to me, and I submit to the court, that the expression "every contract in restraint of trade" is quite as comprehensive as "every contract in any restraint of trade," and much better language. With due respect to the learned counsel, it might be suggested that if his criticism of the language used be a valid one, why may not the next commentator on this section forcefully insist that Congress should have said "every contract in *any and every* restraint of trade is hereby declared to be illegal?"

## XVII.

The reply to Mr. Phelps's attack upon the constitutionality of the antitrust law as construed by this court in the Trans-Missouri Case, is to be found in the argument of Mr. Carter that railways are public highways, and in the furnishing of public transportation perform in a sense a governmental function. The right of the Government

to regulate contracts between carriers and shippers and to place proper restrictions upon contracts among carriers themselves, in order to protect the interests of the public, as affected by these instrumentalities of commerce, has not heretofore been seriously questioned. The States regulate the construction, maintenance, and operation of railroads, prescribing and enforcing maximum rates, preventing the consolidation of competing lines, and securing to the public the benefit of competition.

The doctrine laid down in the case of *Munn* v. *Illinois* applies. When a man devotes his property to a public use, to that extent he grants the public an interest in that use. The same policy which supports the prohibition against consolidation, and the fifth section of the interstate commerce law forbidding the pooling of freights or the division of earnings, is the justification for the declaration that all contracts in restraint of trade shall be deemed illegal. The result of the consolidation, the pooling, or the combination in restraint of trade, is beside the question. Congress is entitled to pass judgment upon the tendency of a contract in restraint of trade. If it deems such a contract reprehensible, injurious in its tendencies, it may prohibit it, whether the act will result in a particular case in the establishment of reasonable or unreasonable rates.

## XVIII.

*As to the remedy in the case of an unreasonably low rate.*

Judge Cooley, in a well-considered opinion In re C., St. P. & K. C. Rwy. Co. (2 I. C. C., 231), approved by

this court in Interstate Commerce Commission *v.* Railway Company (167 U. S., 511), held that under the interstate commerce law the Commission has no power to determine that a rate is unreasonably low and to order the carrier to refrain from charging such rate on such ground, saying:

> But every statute is to be read in the light of its history and of the evils it was intended to redress. And as matter of public history nothing can be more notorious than that the act to regulate commerce had for its leading and general purpose, to which other purposes were subordinate, to provide effectual securities that the general public, in making use of the means of railroad transportation provided by law for their service, should have the benefits which the law had undertaken to give, but of which, in very many cases, it was found the parties entitled to them were deprived by the arbitrary conduct, the favoritism, or the unreasonable exactions of those who managed them. It may be affirmed with entire confidence that the act was not passed to protect railroad corporations against the misconduct or the mistakes of their officers, or even primarily to protect such corporations against each other.
>
> The act does, indeed, require them to afford reasonable, proper, and equal facilities for the interchange of traffic between their respective lines; but even this requirement was for the public benefit more particularly than for the benefit of the carriers themselves. Everywhere in the act the primary purpose apparent in its provisions is that individuals dealing in matters of transportation with the carriers regulated by it shall not, in respect to the conveniences the carriers are supposed to offer to the public

be wronged by arbitrary conduct or by favoritism or be subjected to extortion. It is to this end that the act declares that all charges made by the carriers it regulates shall be reasonable and just, and the purpose of the declaration is to establish the rule that the charges shall not be extortionate.

If such was the primary purpose of the statute, as unquestionably it was, then the proper meaning of the terms "just and reasonable" as employed in it are apparent. They were employed to establish a maximum limitation for the protection of the public; not a minimum limitation for the protection of reckless carriers against their own action. That a minimum limitation was not in the mind of Congress we may easily satisfy ourselves by considering what would have been the probable fate of any distinct proposition to confer upon the Commission the power which it is now urged to assume. There is not the least reason to suppose that any such proposition would have been seriously entertained in Congress or that it could have received any considerable support. It would, on the other hand, in all probability have been promptly rejected as wholly unnecessary for the protection of those who had complete powers of protection in their own hands, and as being little short of impertinent intermeddling.

If such would have been the fate of the proposition expressed in plain terms, then the conclusion is unavoidable that the general terms made use of in the statute do not confer the power the proposition would involve. We can not as a matter of construction deduce from the general terms of a statute a legislative intent which there is no reason to suppose existed in fact, but which on the other hand the circumstances all tend to show was not

suggested when the law was under consideration, and if it had been suggested would have been received with no favor.

## XIX.

*As to the remedy in the case of an unreasonably high rate.*

The common law requires that rates shall be reasonable and fair. So does the interstate commerce law. But this is a mere declaration, and there is no adequate remedy to enforce the right. The Commission has no power to prescribe a reasonable rate and enforce it, or to declare that a rate is unreasonable and prohibit it. The shipper is therefore left to recover the excess in rate paid. I know of no case where the excess charged over a reasonable rate on interstate commerce has been recovered back. The amount involved in any particular transaction would be small; it would require years to carry the case through the courts, and no individual shipper would invite the ill will of a powerful railroad by beginning such a contest.

Moreover, the man who actually pays the freight is not the man who suffers from the unreasonable charge. Take the case of grain. The farmer sells to the commission merchant. If the rates are excessive, he gets so much less for his grain or the purchaser from the commission merchant pays so much more for it. The commission merchant who pays the freight has no real interest in the charge. Of course this is not always true, but it does apply with respect to the great shipments handled by middlemen.

Finally, it is questionable under the interstate commerce act whether a suit to recover back an excess paid above a reasonable rate can be maintained, if the rate charged was that fixed in the schedule filed with the commission and published under the interstate commerce law.

In *Van Patten* v. *C. M. & St. P. Ry. Co.*, 81 Fed. Rep., 545, the circuit court of the United States for the northern district of Iowa (Judge Shiras) held that the standard of reasonableness fixed by the interstate commerce law is the published rate, and that it was a good defense, in an action for damages for alleged extortionate charges, to show that the charges made were in accordance with the rates fixed in the schedule filed with the Commission. In showing the impossibility of a judicial determination of the question whether, under modern conditions, a charge for transportation was or was not reasonable, Judge Shiras says (p. 552):

> How could the jury fairly and understandingly deal even with the case of a single shipment, provided the duty is placed upon the jury of determining what a fair and reasonable charge for the particular service would be, unless some standard, already recognized and established, is given them for their guidance? It is impossible for the jury to deal with the questions of the total cost of building, equipping, and operating the line of railway as a whole, the proportionate cost of the particular transportation in question, the total amount of business done over the entire system, the total burden properly to be laid upon the total business for transportation charges, and the proper proportionate share which the particular shipment should bear.

If these general lines of inquiry are not available as guides for the jury in reaching a solution of the question, can recourse be had to any other standard of charges than that which may be likened to the market rate, and which is the result of free competition among those engaged in the business of common carriers? If it be the fact that as the result of free competition among carriers certain rates have been established for given services, what better guide could be given to the jury, when they are called upon to determine whether a rate exacted by a carrier from a shipper is or is not reasonable, than the rate adopted by those engaged in the business, and subject to the effects of free competition?

As I construe the act, this standard or guide is provided by the act in question. The statute is based upon the principle, which is the controlling element in regulating prices, values, and rates in the general commercial and manufacturing business of the country—self-interest controlled by free competition. When the act was adopted Congress well knew that every railway line was using and would continue to use, its utmost endeavors to secure as large a share of the transportation business within its reach as it was possible for it to do. The great complaint was that each railway, by means of secret rebates or other like devices, was endeavoring to outstrip its rivals in securing business. The theory of the act is that, if competition is left free at all points where two or more lines come into competition, there will be found established reasonable rates.

If, in scheduling its rates as required by the act, a carrier should increase the rate beyond a reasonable limit, its competitors would speedily capture the business at the competitive points, and of necessity, and under the spur of self-interest, the carrier

would be compelled to reduce the rate to one that was reasonable. Hence the act forbids pooling and all combinations having for their purpose the establishment of rates by agreements between competing carriers. Having thus provided for securing reasonable rates at competing points, a basis is found for the establishment of like reasonable rates at all intermediate places where direct competition does not exist, by the adoption of the clause forbidding a greater charge, under like circumstances, for a shorter than a longer haul, and by the liability of the carrier to damages if the schedule adopted and posted shows that a rate out of proportion, and therefore unreasonable, has been fixed for any of the points named in the schedule.

XX.

Not for the purpose of showing that the agreement is of necessity a pooling contract, but in order to show that the pooling of freights may be carried on under it, and, at any rate, all the objectionable features of a pooling contract are present in this agreement, with equally injurious tendencies and possibilities, I print as an appendix hereto an extract from the brief of Mr. Wallace Macfarlane, United States attorney, in the circuit court of appeals in this case.

XXI.

A printed stipulation was filed, signed by Mr. Carter, as counsel for the Joint Traffic Association. No question as to the jurisdictional amount involved has been made by counsel for the appellees either in the briefs or on oral argument. I have in my possession stipulations,

similar to that filed and printed, which are signed by the solicitors for all the appellees, and also affidavits showing that the amount involved in the case is far above the jurisdictional requirement. In order not to burden unnecessarily the files of the court these have not been filed, but will be should the court desire it.

## XXII.

As the law stands, the Commission has no power to prescribe or enforce rates. Competition secures reasonableness; the law enforces uniformity. In *Interstate Commerce Commission* v. *Railway Company*, 167 U. S., 479, this court, speaking by Mr. Justice Brewer, held that if Congress had intended to give the Commission power over rates it would have done so in unmistakable language. So, too, when Congress sees fit to take the railroads out of the operation of the natural law of trade it will do so in plain terms, and for independent competition will substitute Governmental regulation.

JOHN K. RICHARDS,
*Solicitor-General.*

# APPENDIX.

## EXTRACT FROM ARGUMENT OF MR. WALLACE MACFARLANE ON THE POOLING SECTION.

The interstate commerce act was the result of a special investigation carried on by a special committee of the Senate of the United States, known as the Cullom Committee. This committee took a large amount of testimony and made an elaborate report. Its report is published in one volume as Senate Report, first session Forty-ninth Congress, Volume II, and the testimony in a separate volume, entitled Senate Report, first session Forty-ninth Congress, Volume III. To this testimony and report the court may refer as an authoritative source from which to derive a correct apprehension of what section 5 of the act finally passed means by the pooling of freights of different and competing railroads.

The history of the act and the debates in Congress upon the antipooling clause, as section 5 has been commonly termed, are also very instructive, as showing what it was that Congress meant to prohibit. The writings of authoritative authors on the subject may also be consulted.

It will appear that at the time of the passage of the "act to regulate commerce" two classes of pooling arrangements were well known and in common use.

(1) The agreement to "divide the traffic."

(2) The agreement to "divide the earnings."

The first was commonly called a traffic or freight pool; the second a money pool (Hadley on Railroad Transportation, pp. 74–76, 91–97).

The traffic pool is designated in the "act to regulate commerce" (sec. 5) as "pooling of freights;" the money pool as "division of the aggregate or net proceeds of the earnings or any portion thereof."

*The essential feature in an agreement for the "pooling of freights" is an arrangement for the apportionment of the competitive traffic within the scope of the agreement in shares arrived at without competition.* These shares may be agreed percentages fixed beforehand, or equitable proportions determined by a board of managers or arbitrators, or in any manner satisfactory to the parties.

Such arrangements are made a feature of agreements to maintain rates among competing carriers in order to take away the temptation from the weaker and inferior roads to get business by cutting the rates agreed upon by their superior competitors, and to keep such roads in the combination. If a road will only get its agreed percentage or equitable share, no matter how much of the traffic it may in fact carry, and will have to account for the excess either by a payment of money or by carrying less than its share during the next settling period, there is no motive to cut rates in order to get more business.

Pooling is described by the Hon. Thomas M. Cooley, in an article published in the Railway Review on January 8, 1887. I quote from it and other articles on the same subject published in a volume entitled Compendium of Transportation Theories, published in 1893 by

Kensington Publishing Company, of Washington, of which a copy is submitted with this brief. Many of these articles are written from the extreme railroad point of view. I quote them, however, to show what a "pooling of freight" is. The title of Judge Cooley's article is "Popular and legal view of traffic pooling." What Judge Cooley says on this subject has great authority. Prior to the passage of the interstate commerce act, he had been one of the board of arbitrators under one of the trunk-line agreements, known as the joint executive committee. After the passage of the interstate commerce act, he became chairman of the commission. A long judicial experience also had made him very familiar with the laws relating to railroads. In the article referred to, under the heading "*What they are*," Judge Cooley defines pools. He recognizes that there are two classes of pools, one where the basis is an equal division of profits, the other where the basis is a division of business between the contracting parties. At page 230 of the volume above mentioned he says:

> In this country the method of pooling seems to be for the several contracting parties to create some common authority upon which will be conferred the power to establish and change rates for the transportation of property within a certain territory or over a certain line, and also to apportion the business between them. The apportionment will be made upon a consideration of what the companies severally would be likely to obtain under the operation of free competition, and it will be changed from time to time if found to be relatively unjust. The feature of arbitration upon

> controversies arising between the contracting parties will also be prominent in the arrangement. The contract will be made for a definite term of years, with liberty to dissatisfied parties to withdraw upon reasonable notice, and it will be likely to provide that a commission acting for all shall give direction to shipments when this shall be necessary to give each road its allotted share. But as shippers will have a legal right to have their property transported by a line of their own selection, it may well happen that some roads will carry more and some less than their proportion, and provision will therefore be necessary for a periodical adjustment of balances and for the payment of moneys from one to another as may be needful upon such allowance for the business done above the allotted share as shall be fixed upon as just. Perhaps clauses will be inserted in the contract which will have for their purpose to make it for the interest of shippers to send forward their property according to the directions of the commission, but compulsory power in this direction must practically be very limited.

Judge Cooley then states, as the purpose of pooling arrangements, as follows:

> The avowed purpose in pooling is to avoid ruinous competition between the several roads represented, and the unjust discrimination between shippers which is found invariably to attend such competition.

At page 238, under the heading "Sanctions for pooling contracts," he says:

> Penalties to be imposed by the association will be out of the question. They will not be paid voluntarily by parties who will not voluntarily observe their agreements, and they can not be col-

> leeted by law. No doubt, it might be made part of the pooling arrangement that a fund should be provided by proportionate contributions, and that from the sum paid in by any member a penalty assessed against it should be paid; but it would be easy for such member, if dissatisfied, to enjoin the payment, or in case of its failure to take steps for that purpose, for any of its stockholders to do so. Penalties, therefore, can not constitute a reliance.
>
> The principal danger to be guarded against is the cutting of rates. In the unregulated and unreasoning strife between railroad companies this cutting is not only carried on to an extent that is ruinous to the companies themselves, but it becomes a disturbing factor in all commerce; and it is perfectly correct for the railroad companies to say, as they do when defending pooling, that unjust discriminations are a necessary result.

This article was written by Judge Cooley in January, 1887, a month before the interstate commerce act was passed. Obviously, as he recognizes (p. 237), pooling agreements do not always take the same form. All the details mentioned in the passages quoted may not appear in the same contract, but in all will be found provision for apportioning the traffic *without competition*.

On January 8, 1889, after he had been an Interstate Commerce Commissioner for two years, Judge Cooley delivered an address entitled "The interstate commerce act—pooling and combinations which affect its operation," published in the same volume at page 242. At page 247 of this address, he says:

> Let us see what pooling involves.
>
> It is desired to establish it, we will say, in trunk-line territory. There are some strong lines there,

and some very weak ones; there are short lines and long; there are direct roads for the business between leading points, and there are roads twice as long which, nevertheless, demand a share of the business. There are local roads which have fair claim to nothing but local business, but which are nevertheless capable of being made links of long but circuitous lines, and of thus becoming disturbers of rates for the whole territory. The problem, when pooling is proposed, is how to satisfy all the parties; *how to apportion the business so that all will be content and remain so.* And at the outset it must be understood that there is not business enough to make them all profitable, and inevitably some must have precarious existence."

At page 72, in an article entitled "The railroads as one system," Mr. Joseph Nimmo, jr., under the heading "The federation of the railroads," says:

But even as thus organized, railroad traffic associations exhibited a fatal infirmity. The reforms which they proposed were beneficent, but the spirit of the reckless and uncontrolled competition survived. * * * The root of the difficulty lay in the fight by each company for a larger share of the competitive traffic than any other company was willing to grant it. Hence was evolved out of the fierce interaction of forces the new law of self-restraint—*agreements as to the share of the competitive traffic which should be carried by each line.* * * * *The agreement as to the apportionment of traffic is the corrollary of the rate agreement.* The former is no more in restraint of competition than is the latter. Both restrain destructive competition, which run to disorder.

He then says (p. 77):

> It is unfortunate that, in giving the force of legality [the writer refers to the interstate commerce law] to so much which experience had proved to be just and beneficent, the legislator should have gone astray in regard to a clearly established law of the American railroad system which had been forced upon railroad managers by the logic of events. *I refer to the clearly established fact that the maintenance of rates must be based upon precedent agreements as to the share of the competitive traffic which shall be secured by each competitor.* The fifth section of the act forbids such agreements, and thereby forces the railroads to the violation of every beneficent provision of the statute.

In an article in the same volume, entitled "Amendment of interstate commerce law," published in June, 1893, written by Aldace F. Walker, a railroad manager of great experience and formerly an Interstate Commerce Commissioner, he says (p. 13):

> It is also becoming generally understood that making or "establishing" of railway rates, and the "maintaining" of those rates when so established, are two very different things; that both are absolute necessities to any scheme of governmental supervision; and that the pooling of freights or of earnings is the only practical way known in the history of the world, short of a common ownership, by which such an absolute maintenance of rates as is justly required by law for the prevention of unjust discrimination can be secured. In other words, it is seen at last *that the fair division of competitive traffic would be an aid and support to the regulative system.*

In an article in the same volume, page 136, Prof. Henry C. Adams, statistician of the Interstate Commerce Commission, under the heading "How may rates be maintained?" says:

> Pooling means the limitation of competition, or what amounts to the same thing, an agreement respecting the conditions under which competition shall take place.

In an article in the same volume entitled "The interstate commerce law," Mr. Charles Francis Adams, page 181, says:

> *The practice known as pooling, which the interstate commerce act inhibits, was merely a method through which the weaker railroad corporations were kept alive.* To prevent excessive and unequal competition, business was so divided that the less favored corporation had some share of traffic assigned to it. This practice the law put a stop to; and it further enacted that rates to competing points should not be less than rates to intermediate points.

After advocating the repeal of the antipooling clause of the interstate commerce law, Mr. Adams, at page 184, says:

> If the antipooling provisions of the act may not be wholly repealed, let them, at least, be so modified that contracts made among railroads, subject to the approval of the Interstate Commerce Commission, for the division of competitive traffic at reasonable rates, may be binding in law.

In an article in the same volume entitled "The necessity for railway compacts under governmental regulations,"

by Mr. James Peabody, editor of the Railway Review, the writer says at page 220:

> The word "pool," as applied to compacts by which the equitable distribution among carriers of common traffic is sought to be effected, is both inapt and inaccurate, especially as there is attaching to it a disreputable flavor growing out of its intimate association with gambling operations. * * * Pooling as applied to the carrying business *expresses an effort on the part of carriers to distribute common business in an intelligent and economical way instead of allowing it to seek, through the medium of rate wars, those channels which will pay the most for it.* * * * At the time the act to regulate commerce became effective it had come to include the fundamental principles of the act—to wit, the removal of discrimination as between shippers, and the maintenance of equal rates for similar and contemporaneous service.

And in summing up at page 221 the author says:

> Third. Traffic or pooling compacts which provide *for the equitable division of common traffic* are the only yet discovered means whereby the interests of all parties may be conserved.

In another article in the same volume, entitled "The apportionment of traffic among competing railroads," by Mr. Joseph Nimmo, jr. (p. 221), pools are defined as agreements for the division of competitive traffic for the maintenance of rates among competing railroads.

Mr. J. F. Hudson, in his book on The Railways and the Republic, defining pools, says at page 196:

> In general the term is applied to any combination between railways engaged in competitive traffic to maintain rates by suspending competition.

The author then defines the general characteristics of the two classes of pools, namely, traffic pools and money pools.

In his testimony before the Hepburn committee[1] in 1879, Mr. James H. Rutter, then general traffic manager of the New York Central and Hudson River Railroad Company, was asked the following question:

> Q. Explain what pool is, please?
>
> A. Dividing the business; each agreed to take a certain proportion of the traffic and take means to see that each one got its proportion. (Vol. 1, Report of Hepburn Com., p. 282.)

Mr. William H. Vanderbilt, then president of the New York Central and Hudson River Railroad Company, and Mr. H. J. Jewett, then president of the New York, Lake Erie and Western Railroad Company, wrote a joint letter to the Hepburn committee, and at page 55 of the same volume they take up the question of pooling. These gentlemen in this letter (p. 56) say:

> We go further than the address, and assert that pooling is a successful plan for preventing railroad wars and securing uniformity and permanency in rates.

At page 57 they say:

> If, then, the railroad companies agreed to pool the traffic at such competitive points and fix the rates on the principles above established, whose interests are damaged?

[1] NOTE.—This committee was appointed in 1879 by the legislature of the State of New York to investigate the railroad pools then existing. Its report throws much light on the subject of pooling.

In his book on railroad transportation Mr. Arthur Hadley, then commissioner of labor statistics of the State of Connecticut and an instructor in political science in Yale College, classifies pooling agreements as follows (p. 74):

> This agreement may take any one of four forms:
> 1. Agreement to maintain rates.
> 2. To divide the field.
> 3. To divide the traffic.
> 4. To divide the earnings.
> The last three are commonly known as pools.

Mr. Hadley then briefly discusses the characteristics of each form of agreement. Discussing the third form, namely, to divide traffic, he says, at page 75:

> But in the majority of cases this arrangement (to divide the field) is impracticable, and the rival concerns agree upon the proportion of business which each is to do. * * * Railroads agree to just what percentage of competitive traffic each road shall carry.

And again, at pages 91 to 97, the learned author discusses railroad pools in their relation to competition and combinations, and also discusses the history of pools in the United States.

In the testimony taken before the Cullom Committee much was said in respect to the nature of pooling agreements, and the testimony of the various witnesses can readily be referred to by means of the index under the heading, "Pooling agreements by railroads." In the first part of the committee's report there is an appendix, containing a good many statements from witnesses which were too late to be published with the testimony.

Nearly all these witnesses replied specifically to the seventh question of the committee, which called for expressions of opinion upon the nature and advisability of pooling contracts. At page 33 of Part II, Mr. William E. Rogers, one of the railroad commissioners of the State of New York, says:

> I am clearly of the opinion that there is no way to secure uniformity of rates over its railroads except by allowing them to determine among themselves the rates of freight they will charge; in other words, a pooling arrangement—subject, however, to official control.

Mr. Albert E. Fink, for years the commissioner of the trunk lines under their pooling arrangements, and himself the principal author of such arrangements in the United States, testified at length before Mr. Cullom's committee. His testimony will be found in Part II, pages 89 to 126. Mr. Fink's testimony shows quite clearly what the nature of a pooling agreement is. Mr. Fink shows that schedules of rates could be agreed upon between competing and connecting carriers without any reference to pools, but mere agreements to maintain rates were practically unenforceable. The pooling feature of such agreements was invented and introduced for the purpose of enforcing the agreement. At page 116 of Part II of the Cullom report Mr. Fink was asked the following question:

> Senator PLATT. Having got the tariff, would a pooling arrangement be necessary?
>
> Mr. FINK. No, it would not be necessary if you could strictly enforce the tariff by law, but it would be a great aid in enforcing the law. The only

object of the pooling agreement is to enforce the agreed and published tariffs. They have nothing to do with making the tariffs. Tariffs are established entirely without reference to pools. I have explained that they are regulated by other considerations. But once being established, the pooling system is adopted to maintain such agreed tariffs, and it is a more efficient method than any legislation that you can possibly devise, because it strikes at once at the very root of the evil by removing the motive for violating the published tariffs, the motive for paying rebates, and making secret commissions to shippers. The pooling agreements are intended to prevent the fights between railroad companies which render it impossible to maintain proper tariffs. * * * *By the pooling agreements the question of how much each road shall carry is determined by mutual agreement or arbitration, making the fighting unnecessary.*

His whole testimony on this subject is of interest and importance. In the appendix to part 1 of the Cullom report, containing the statements of a great many persons expert in railroad matters, will be found very valuable descriptions and definitions of pooling contracts. Special attention is called to the statement of Mr. John D. Kernan, then chairman of the New York railroad commission, at pages 17 to 21 of the appendix.

At page 213 of the appendix Mr. Charles E. Perkins, then president of the Chicago, Burlington and Quincy Railroad, defines pools as follows:

> A pooling contract is in effect a mere agreement between rival railroads that they will not permit their agents in the contest for business to cut rates unreasonably low.

(3) That the supposed evil which Congress intended to suppress by prohibiting "*pooling of freights*," was the familiar arrangement between competing carriers to apportion the competitive business in equitable shares in order to remove the chief motive for cutting rates, is evident from the debates in Congress on the bill.

March 17, 1886, Mr. Cullom reports the bill (S. 1532) to the Senate from the Senate Committee on Commerce (Congressional Record, Forty-ninth Congress, first session, vol. 17, part 3, p. 427).

Bill debated in the Senate (pp. 2427, 2477, 2907, part 4; pp. 3440, 3470 to 3478, 3511, 3552 to 3556, 3687, 3693, 3721 to 3728, 3824 to 3535, 3866 to 3879, 3921, 3975, 4007, 4178 to 4187, 4223 to 4240, 4306 to 4322, 4347 to 4362, part 5; pp. 4353 to 4370, 4396 to 4423).

Passed the Senate, May 12, 1886 (p. 4423).

Referred to House Committee (part 5, p. 4509).

May 22, 1886, Mr. Reagan, from the House Committee on Commerce, reported back the Senate bill to regulate commerce with an amendment in the nature of a substitute (p. 4809).

Committee report taken up in the House July 21, 1886 (part 7, p. 7276).

(At page 7279) Mr. Reagan, chairman of the House Committee, reports that the amendment proposed by the committee to the Senate bill was to strike out all after

the enacting clause and substitute the provisions of the House bill for it.

A bill substantially similar to the House bill had been passed in three different Congresses by large majorities.

After the House, during this session, was in a position to take up the bill reported from its committee, the Senate bill came to the House; the committee thereupon took the Senate bill referred to them and acted upon it by making the report now under consideration.

At page 7280 Mr. Reagan explains the difference between the two measures. The Senate bill differs from the House bill in that its provisions relate to the transportation of passengers as well as freight, and transportation by water as well as by land. As far as pooling is concerned, as appears from Mr. Reagan's statements (p. 7281), the Senate bill had provided by section 19:

> The said commission shall specifically inquire into the methods of railroad management or combination known as pooling, and shall report to Congress what, if any, legislation is advisable or expedient upon that subject.

And Mr. Reagan said (p. 7281):

> The second section of the House bill provides, among other things, that "it shall not be lawful for any person or persons carrying property as aforesaid to enter into any contract, agreement, or combination for the pooling of freights or to pool the freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads or any portion of them, and in case of any agreement for the pooling of freights or earnings as aforesaid

each day of its continuance shall be deemed a separate offense.

This is a clear, specific provision for the prevention of pooling. * * * The House bill provides for action. The Senate bill proposes inquiry.

Mr. Reagan continued (page 7281):

> Pooling by railroad is prohibited by the constitution of the States of Arkansas, Michigan, Missouri, Nebraska, Pennsylvania, and Ohio. It is prohibited by the laws of other States. Pooling is a violation of the common law, because it is a restraint upon the freedom of trade and a conspiracy against the public welfare. And this doctrine is maintained in the following American cases: 8 Mass., 223; 1 Pickering, 450; 35 Pickering, 188; 19 Pickering, 51; 35 Ohio State Reports, 672; 68 Pennsylvania State, 173; 5 Denio, 434; 4 Denio, 349.

The minority of the House committee report against the committee bill (p. 7285), stating that they do not believe that the absolute prohibition of pooling is necessary: "There should be legislation imposing restrictive provisions, for the shipper should not be placed at a disadvantage, or competition in freight charges lessened so that transporters only should be benefited." The issue as to the prohibition of pools was thus squarely raised.

Mr. Reagan, further discussing the question of pools (p. 7298), says:

> Another thing: The House bill prohibits the pooling of freights and prohibits the dividing of the proceeds, or any part of the proceeds, coming from the freights. The gentlemen from Iowa (Mr. Hepburn) this evening made the criticism that

this bill only prohibited pooling freights, and did not prohibit pooling money. The gentleman had read the bill to little purpose. It prohibits the pooling of freight and the dividing of the product of the pool. These pooling arrangements enable the making of one vast monopoly from several small monopolies, and would give to the railroads control of the transportation and commerce and wealth of the country, and ultimately the control of its polities and its liberties. Pooling, in principle, has been forbidden by the common law for six hundred years and more; it is forbidden by the constitutions of many States, and by the laws of many others; forbidden by the whole line of judicial decisions running through many years, and I referred to a number of such decisions to-day. Now, the House bill proposes to do something to protect the people. The Senate bill proposes to inquire whether something is necessary to be done. These are the main features of difference between the bills.

July 30, 1886, the House adopts the committee's substitute for the Senate bill and passes the same—192 yeas, 41 nays (vol. 17, part 8, pp. 7755–6).

A conference committee from the House confer with the Senate committee (p. 7818). The Senate receives the bill as amended from the House and appoints a committee of conference.

December 15, 1886, the conference committee of the two Houses, composed of Messrs. Cullom and Harris on behalf the Senate, and Messrs. Reagan, Crisp, and Weaver on behalf of the House, report a bill to the Senate, being the one which was passed and became what is known as the interstate commerce act (Congressional Record, Forty-ninth Congress, second session, vol. 18, part 1, p. 169).

Senator Cullom, explaining to the Senate the Conference Committee measure (p. 170), says:

> Section 19 (of the Senate measure), requiring an immediate investigation by the commission of the necessity of legislation upon the subject of pooling, has been stricken out, and section 5 of the committee bill contains the provision of the House bill prohibiting pooling, with some modifications of the language."

Senator Platt, the sixth member of the conference committee, opposed the conference bill, particularly the antipooling provision (pp. 170, 171).

The report of the conference committee is given on pages 171 to 173, and from it it appears that the whole measure has been made applicable to passenger as well as freight traffic, and so far as the pooling provisions are concerned, section 19 of the Senate bill has been stricken out, and section 2 of the House bill was slightly modified, and as such became section 5 of the new measure, and reads as follows (p. 172):

> SEC. 5. That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads or any portion thereof; and in any case of an agreement for the pooling of freights as aforesaid, each day of its continuance shall be deemed a separate offense.

The measure was discussed at a number of different times and at length in the Senate, both *pro* and *con*. In

a speech against the bill made by Senator Platt (vol. 18, p. 361), he said:

> "*What is a pool? What is a pooling contract? It is simply an agreement between competing railroads to apportion the competitive business; that and nothing more. I repeat it—it is an agreement between competing railroads to apportion the competitive business.* It does not touch the local business; it does not reach it; it has no reference to it. The local business is left to each individual company. It is noncompetitive." Pooling has nothing to do *per se* with making rates.

The report of the Conference Committee was adopted by the House January 21, 1887, by a vote of 219 to 41 (vol. 18, part 1, p. 881), and the bill passed. It then went to the President, was signed, and became the interstate commerce act, to be found in 1 Supplement Revised Statutes, pages 529 and 530.

It sufficiently appears, therefore, that the phrase "*pooling of freights*," in section 5 of the "Act to regulate commerce," means an agreement between competing carriers to apportion traffic between them in shares determined without competition in order to prevent reduction of rates by competition for business.

(4) *Pooling contracts have been almost invariably held to be illegal in American courts.*

Pooling contracts have frequently been held illegal as between the parties thereto. (*Chicago, Milw. and St. P. R. R. Co.* v. *The Wabash, &c., Ry. Co.*, 61 Fed. Rep., 993, C. C. A. Eighth Circuit, May 7, 1894; *C. C. C. & G. R. R. Co.* v. *Closser*, 126 Indiana, 348; *Gulf,*

*Colorado and Santa Fe R. R. Co.* v. *Texas*, 72 Texas, 404; *Texas Standard Oil Co.* v. *Adoue*, 83 Texas, 650; *Texas and Pacific Rw. Co.* v. *The Southern Pacific Rw. Co.*, 41 Louisiana Annual, p. 970; *Gibbs* v. *Consolidated Gas Co.*, 130 U. S., 396; *Anderson* v. *Tett*, 89 Kentucky, 375; *Emery* v. *Ohio Candle Co.*, 47 Ohio St., 320; *Morrill* v. *B. & M. R. R. Co.*, 55 N. H., 531; *Morris Run Coal Co.* v. *Barclay Coal Co.*, 68 Pa. St., 173; *Stanton* v. *Allan*, 5 Denio, 434; *Denver, &c., R. R. Co.* v. *Atchison R. R. Co.*, 15 F. R., 651, U. S. C. C. Dist. of Colorado; *Central Trust Co. of New York* v. *The Ohio Central R. R. Co.*, U. S. C. C. N. D. Ohio, 23 Amer. and Eng. R. R. Cases, vol. 23, p. 666).